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SUBCHAPTER 17. PROCEDURES FOR DECISION MAKING - ADJUDICATORY HEARINGS AND STAYS OF PERMIT CONDITIONS

7:14A-17.1 Purpose and scope

- (a) This subchapter sets forth the procedures for requesting an adjudicatory hearing and a stay of permit conditions and for the Department's evaluation and processing of such requests. The procedural stages for requesting an adjudicatory hearing and stay of permit conditions are outlined in Appendix A which is to be used for guidance purposes only and is of no legal effect.
- (b) The Department's decision regarding any adjudicatory hearing request and/or request for a stay shall be considered final agency action.

7:14A-17.2 Request for an adjudicatory hearing

- (a) A permittee or a person who seeks and qualifies to be considered a party to the action pursuant to N.J.A.C. 7:14A-17.3 may submit to the Department a written request, by certified mail, or by other means which provides verification of the date of delivery to the Department for an adjudicatory hearing to contest the Department's final decision to:
 - 1. Issue a new permit, permit modification, permit revocation and reissuance, permit renewal, permit suspension, or permit revocation;
 - 2. Deny an application for a new permit or a permit renewal; or
 - 3. Deny a variance pursuant to N.J.A.C. 7:14A-11.8.
- (b) In order to request an adjudicatory hearing, a permittee shall submit the request in accordance with the requirements in (e) below within 30 days following receipt of the Department's notification of a final permit decision under N.J.A.C. 7:14A-15.15(a). In addition, the permittee shall provide a copy of its request for an adjudicatory hearing to any other person named on the permit.
- (c) In order to be considered a party to the action for purposes of requesting an adjudicatory hearing under this section, a person shall submit a request in accordance with the requirements in (f) below within 30 days following receipt of the Department's notification of final permit decision under N.J.A.C. 7:14A-15.15(a). In addition, such person shall forward a copy of the request to the permittee.
- (d) The request for an adjudicatory hearing shall be submitted to the Department at the address listed below, and a copy of the request shall be submitted to the permit issuing office:

Office of Legal Affairs

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Attention: Adjudicatory Hearing Requests
Department of Environmental Protection
PO Box 402
Trenton, New Jersey 08625 - 0402

- (e) A permittee shall request an adjudicatory hearing by completing a Department adjudicatory hearing request tracking form which shall contain the following information:
1. For the Office of Legal Affairs only, a copy of the permit clearly indicating the permit number and issuance date;
 2. For the permitting office only, the facility name and permit number;
 3. The date that the notification of the final permit decision was received by the permittee;
 4. A list of the specific contested permit condition(s) and the legal or factual question(s) at issue for each condition, including the basis of any objection;
 5. A statement as to whether the permittee raised the legal and/or factual issues during the public comment period in accordance with N.J.A.C. 7:14A-15.13;
 6. The relevance of the legal and/or factual issues to the permit decision;
 7. Suggested revised or alternative permit conditions and how they meet the requirements of the State or Federal Act;
 8. A request, if necessary for a barrier-free hearing location for disabled persons;
 9. An estimate of the amount of time required for the hearing;
 10. The name, mailing address and telephone number of the person making the request(s);
 11. The name(s) and address(es) of the person(s) whom the requester represents; and
 12. Information supporting the request or other written documents relied upon to support the request, unless this information is already in the administrative record (in which case, such information shall be specifically referenced in the request).

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- (f) A person seeking consideration as a party to the action shall include the following information in such person's request for an adjudicatory hearing:
1. The facility name and permit number;
 2. A statement setting forth:
 - i. Each legal or factual question alleged to be at issue;
 - ii. Whether the legal or factual issue was raised by that person during the public comment period in accordance with the provisions of N.J.A.C. 7:14A-15.13;
 - iii. The relevance of the legal or factual issue to the permit decision, together with a designation of the specific factual areas to be adjudicated; and
 - iv. An estimate of the amount of time required for the hearing;
 3. The date that notification of the final permit decision was received by the person making the hearing request;
 4. The name, mailing address, and telephone number of the person making the request;
 5. A clear and concise factual statement of the nature and scope of the interest of the requester which meets the criteria set forth at N.J.A.C. 7:14A-17.3(c)4;
 6. The names and addresses of all persons whom the person making the hearing request represents;
 7. A request, if necessary, for a barrier-free hearing location for disabled persons;
 8. A statement by the person making the hearing request that, upon motion by any party granted by the administrative law judge, or upon order of the administrative law judge's initiative, such person shall make available to appear and testify at the administrative hearing, if granted, the following persons:
 - i. The person making the hearing request;
 - ii. All persons represented by the person making the hearing request; and
 - iii. All officers, directors, employees, consultants, and agents of the person making the hearing request;

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9. Specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions, including permit denials, which, in the judgment of the person making the hearing request, would be required to implement the purposes of the State Act;
 10. Identification of the basis for any objection to the application of control or treatment technologies, if identified in the basis or fact sheets, and the alternative technologies or combination of technologies which, in the judgment of the person making the hearing request are necessary to satisfy the requirements of the State Act; and
 11. A completed Department adjudicatory hearing request tracking form.
- (g) The Department, in its discretion, may extend the time allowed for submission of an adjudicatory request under this section for good cause.

7:14A-17.3 Consideration as a party to the action

- (a) The Department shall determine, or shall refer the determination to an administrative law judge, whether a person, other than an applicant or a permittee, is a party to the action.
- (b) The Department shall determine whether a person is considered to be a party to the action within 30 days of receipt of the request or to refer the request to the administrative law judge. If the request is referred to the administrative law judge, the administrative law judge has an additional 30 days to decide on the request.
- (c) A person shall be considered to be a party to the action only if:
 1. The person's objection(s) to the Department's decision as specified in N.J.A.C. 7:14A-17.2(a) were raised by that person in the public hearing and/or in a written submission within the public comment period established pursuant to N.J.A.C. 7:14A-15;
 2. The person demonstrates the existence of a significant issue of law or fact;
 3. The person shows that the significant issue of law or fact is likely to affect the permit decision;
 4. The person can show an interest, including an environmental, aesthetic, or recreational interest, which is or may be affected by the permit decision and that the interest can be fairly traced to the challenged action and is likely to be redressed by a decision favorable to that person. An organization may contest a permit decision on behalf of one or more of its members if the organization's member or members could otherwise be a party to the action in their own right, and the interests the organization

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seeks to protect are germane to the organization's purpose; and

5. The person submits the information required under N.J.A.C. 7:14A-17.2(f).
- (d) Whenever a person's request to be considered to be a party to the action is granted, the Department or the administrative law judge, as appropriate, shall identify the permit conditions which have been contested by such person for which an administrative hearing will be granted. Permit conditions which are not so contested shall not be affected by, or considered at, the adjudicatory hearing.
- (e) A permittee or applicant shall be allowed to participate in any proceeding where a person, other than the permittee or applicant, is seeking to become a party to the action. All requests by persons seeking to be considered a party to the action for a particular permit shall be combined in a single administrative hearing. When a person's request to be considered a party to the action is granted and a permittee's request for an administrative hearing is granted, the actions may be combined into a single administrative hearing by the Department after consideration of the nature and scope of the issue(s).

7:14A-17.4 Granting or denying an adjudicatory hearing request

- (a) The Department, in its discretion, shall decide the extent to which, if at all, the request for an adjudicatory hearing shall be granted. The Department may grant or deny a request for a hearing in whole or in part.
- (b) The Department shall deny a request for an adjudicatory hearing if:
 1. The request does not conform with the information requirements for a permittee or a person as set forth, respectively, in N.J.A.C. 7:14A-17.2(e) and (f);
 2. The request does not include genuine issues of material fact or of law which are relevant to the Department's decision as specified in N.J.A.C. 7:14A-17.2(a);
 3. The request was not submitted within the time frames specified in N.J.A.C. 7:14A-17.2(b) or (c), as appropriate;
 4. The contested legal and/or factual issues were not raised during the public comment period in accordance with N.J.A.C. 7:14A-15.13;
 5. The request challenges duly promulgated regulations and not the Department's application of the regulations; or
 6. The permittee or applicant is seeking an adjudicatory hearing to contest permit effluent limitations based upon N.J.A.C. 7:14A-12 Appendix C

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which were imposed in the permit due to the permittee's or applicant's specific request to impose those limitations.

- (c) The Department, if it grants a request for an adjudicatory hearing in part, shall specifically identify those contested permit conditions for which an adjudicatory hearing has been granted. The issues presented in the adjudicatory hearing shall be limited to those permit conditions contested in a request for an adjudicatory hearing or those specifically identified by the Department in accordance with this section.
- (d) If a request for an adjudicatory hearing is granted, the contested permit conditions shall not be affected unless a stay has been granted pursuant to N.J.A.C. 7:14A-17.6. A request for a hearing and a request for a stay may be combined into one request document.
- (e) The Department, if it denies a hearing request in whole or in part, shall briefly state the reasons for such denial. Such denial shall be considered a final agency action.

7:14A-17.5 Notice for and conduct of an adjudicatory hearing

- (a) The Department shall provide public notice that an adjudicatory hearing has been granted by mailing a copy of the notice to:
 - 1. The applicant(s) or permittee(s);
 - 2. All commenters on the draft permit;
 - 3. All persons who testified at the public hearing, if held; and
 - 4. All persons who requested an adjudicatory hearing or who requested to be considered a party to the action.
- (b) All adjudicatory hearings held pursuant to this subchapter shall be governed by the New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

7:14A-17.6 Stays of contested permit conditions

- (a) The Department's grant of a request for an adjudicatory hearing shall not automatically stay any contested permit condition(s). A permittee shall submit a written request to the Department, by certified mail, or by other means which provides verification of the date of delivery to the Department seeking a stay of any of the following:
 - 1. Any permit condition where the permittee has requested an adjudicatory hearing, in accordance with N.J.A.C. 7:14A-17.2(a), to contest the specific permit condition;

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2. Any permit condition where the permittee has requested a major modification or revocation and reissuance, in accordance with N.J.A.C. 7:14A-16.4, to alter the specific permit condition; or
 3. The application to the permittee of any condition of a general permit where the permittee has requested to be excluded from that general permit, in accordance with N.J.A.C. 7:14A-6.13(g), to obtain a permit condition different from the specific permit condition.
- (b) A stay shall not be requested or granted for the initial permit issued to a new source, new discharger, or a recommencing discharger. Where such an initial permit is being adjudicated, the permittee shall either discharge in accordance with the initial permit or not discharge until final agency action is taken with respect to the contested conditions of the permit.
- (c) In its request for a stay under (a)1 above, a permittee shall, for each permit condition at issue, submit a written evaluation with appropriate documentation which describes:
1. The permittee's ability to comply with the permit condition(s) using existing treatment facilities. For effluent limitations, the permittee shall summarize the past 24 months of discharge data and indicate the level of pollutant control actually achieved as defined at N.J.A.C. 7:14A-1.2. If no past effluent data are available, the permittee shall procure and submit the results of at least one sample;
 2. The permittee's ability to comply with the permit condition(s) by implementing low cost short-term modifications to the existing treatment facility if it is demonstrated in (c)1 above, that the permit conditions cannot be achieved using existing facilities. Examples of short-term modifications include, but are not limited to, treatment process modifications, chemical addition, pollution abatement/ prevention and change of products generated. The evaluation shall also include the cost for the implementation of such short-term modification(s);
 3. The level of pollutant control actually achieved as defined at N.J.A.C. 7:14A-1.2 using short-term modifications if the evaluations in (c)1 and 2 above demonstrate that the permittee is unable to achieve permit compliance. For effluent limitations, the permittee shall indicate the maximum treatment levels consistently achievable;
 4. The cost to comply with permit conditions if the evaluations in (c)1 and 2 above demonstrate that the permittee is unable to achieve permit compliance using existing facilities and/or short-term modifications. This evaluation may also include a demonstration of any negative economic impacts that the cost to achieve permit compliance will have on the permittee (for example, the need to close, relocate, or reduce production)

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and to the community (for example, the loss of jobs or loss of tax base);
and

5. Environmental impacts, if any, that granting a stay will have on the receiving waterbody.

(d) If the Department determines that the information submitted pursuant to (c) above is deficient, it shall inform the permittee of its determination and establish a time limit for resubmission. If the permittee does not submit the information requested or in the time period specified, the Department shall:

1. Deny the stay request; or
2. Make a final decision based upon whatever information has been submitted.

(e) The Department may grant a stay request, in whole or in part, based upon consideration of the following:

1. For a stay of permit conditions pursuant to (a)1 above, where the permittee has been granted an adjudicatory hearing to contest a specific permit condition(s), the Department, in its evaluation, shall consider:
 - i. The pollution source and its impact upon the affected ecosystem(s);
 - ii. The level of pollutant control actually achieved as defined at N.J.A.C. 7:14A-1.2 by the existing treatment facility;
 - iii. The degree and extent that short-term treatment alternatives including their cost may be applied to the existing treatment facility and what treatment level improvements may result from these alternatives; and
 - iv. The cost to achieve total compliance with permit conditions, including the degree and extent of any negative economic impacts on the permittee and the community in relation to the environmental impacts that will result from not achieving compliance with permit conditions.
2. For a stay of permit conditions pursuant to (a)2 above, where the permittee has requested a major modification or a revocation and reissuance of the existing permit to alter a specific permit condition, the Department shall grant a stay, without the need to request an adjudicatory hearing, if it makes a preliminary determination that a major modification or revocation and reissuance of the existing permit is appropriate but the Department cannot process the modification or revocation and reissuance request in a timely manner; and
3. For a stay of the application of conditions of a general permit pursuant to

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- (a)3 above, where the permittee has requested to be excluded from that general permit to obtain a permit condition different than the specific permit condition, the Department shall grant a stay, without the need to request an adjudicatory hearing, if it makes a preliminary determination that exclusion from that general permit is appropriate but the Department cannot process the request to be excluded from the general permit in a timely manner.
- (f) When a stay is granted, a permittee shall comply with the conditions of the existing permit which are not stayed and all other interim conditions as established in (g) below. The Department reserves the right to withdraw a stay or alter the terms and conditions of a stay at any time for lack of good faith compliance efforts by the permittee or if the Department subsequently determines that the environment is being impacted to such a degree that an alteration(s) to the stayed conditions is necessary.
- (g) Where the Department grants a stay request, the stay decision may include interim conditions, as follows:
 - 1. Interim permit conditions or interim effluent limitations developed in accordance with the considerations in (e) above, or in accordance with N.J.A.C. 7:14A-13.11;
 - 2. Interim conditions by which the stayed permit conditions are phased into effect; and
 - 3. For a stay pending an adjudicatory hearing, the interim conditions shall not be less stringent than the conditions in the existing permit unless it is demonstrated that the existing permit conditions were developed in error and a modification is justified.
- (h) In granting or denying a stay, the Department shall:
 - 1. Detail in writing the specific permit conditions that are stayed, if any; and
 - 2. Include the reasons for granting or denying the stay.
- (i) The Department may, upon its own initiative, issue a stay of a permit condition where it determines based on the considerations in (e) above that a stay is appropriate.
- (j) A person who has requested an adjudicatory hearing in accordance with N.J.A.C. 7:14A-17.2 may also request a stay provided notice of the request is also provided to the permittee. The Department may grant a stay requested by a person if it is demonstrated that issuance of the permit was based upon a substantial error(s) in interpretation of the enabling legislation or interpretation of the applicable rules. The Department shall deny a request for a stay if the

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person fails to meet the criteria for consideration as a party to the action under N.J.A.C. 7:14A-17.3.

APPENDIX A

GUIDE TO THE NJPDES PERMIT APPEAL AND STAY PROCESS

Appendix A is designed to assist a person in following the permit appeal and stay procedures after a permit is issued. An applicant should consult the full text of the regulations when contemplating an appeal and/or stay.

The flow chart outlines a sequence of events, directed by arrows, of the stay procedures for when a final permit is issued. The key items in this section are:

1. A hearing shall be requested within 30 days of receipt of the permit; and
2. A request for a stay may be combined with a hearing request but the request for a stay shall be expressly stated.

Permit Appeal and Stay Process



